



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CASE NO. 144 OF 2010

BENEDICT KARUTI RUKWARU.....1ST PLAINTIFF

NAFTALY MUNGATHIA.....2ND PLAINTIFF

VERSUS

JULIUS KABILO.....DEFENDANT

JUDGMENT

1. The plaintiffs instituted this suit by an amended plaint filed in court on 19th October 2017, praying for judgment as against the defendants as follows; a) **A permanent injunction restraining the defendant, whether by himself or through his agents/servants/employees/representatives and/or anyone else acting or claiming for, on behalf of or through him, from entering into and felling down the plaintiffs trees growing on, splitting them into logs and transporting them away, and/or whatsoever interfering with the plaintiffs quiet and actual possession, user and enjoyment of land parcel No. 9889 situate in the former Antuamburi Adjudication Section within Tigania Adjudication area and now registered in the name of the 1st plaintiff as L.R TIGANIA/ANTUAMBURI/9889.**

b) Special damages of Kshs 282,100/= being the value of the aforesaid felled down trees.

c) Costs of the suit

d). Interests on (b) & (c) above at court rates.

2. A statement of defence was filed on 10.1.2011, whereby plaintiffs' case is denied. Further, defendant has pleaded that if any trees were cut, then they belonged to the sons of M'Chebere Ndwaru and that the dispute was resolved by Njuri Ncheke Elders.

3. **PW1 is Benedict Karuti.** He adopted his witness statement filed in court on 19th October 2017. He testified that the suit property measuring

about 296 acres was their family land recorded in his name and that of the 2nd plaintiff as common owners to hold it in trust for other family members. Sometimes in July 2010, the defendant and his agents illegally and without their consent trespassed on the suit land and felled trees worth Kshs 282,100/= and ferried the same to Michimikuru Tea Factory for sale as firewood. Thus, PW1 desires that defendant be restrained from interfering with the suit property and he be ordered to pay the value of the felled trees and costs of the suit.

4. **PW2 is Stephen Ngiri M' Mburugu.** He testified and adopted his witness statement filed in court on 19th October 2017. He avers that the plaintiffs were his clan mates. He corroborated PW1's evidence that the suit property measuring 296 acres belonged to plaintiff's family and the land was recorded in plaintiffs' names as common owners to hold it in trust for the other family members.
5. **PW3 was Josphat Muchui.** He adopted his witness statement dated 18th October 2017. He corroborated PW1 and 2's evidence and added that he is their clansman. He also states that he found defendant with a lorry loaded with trees on the suit land no. 9889.
6. **PW4 was Jediel Kaberia Miriti.** He adopted his witness statement dated 18th October 2017 whose contents are similar to those of his fellow witnesses. He is a nephew of the plaintiffs. He added that he resides on the suit land with his family.
7. Defence relied on the statement of defence dated 10th January 2011 and their submissions, but did not call any witnesses.
8. It was submitted for the plaintiffs that they had on a balance of probabilities proved that they were entitled to an order of permanent injunction. Reference was made to Sections 24, 25 and 26 of the Land Registration Act No. 3 of 2012 which vest absolute ownership of land to the person so registered. With regard to special damages of Kshs 282,100, it was submitted that the same had been proved through malicious damage assessment report and valuation report dated 1.10.2010 and 12 .10. 2010 respectively.
9. For the defendant, it was submitted that during cross examination of plaintiffs witnesses, it had emerged that some of the trees pleaded in the plaint had never been grown on the suit property namely; *Mutendera, Mithiama, Muriru, Mikui* and *Vitex Emensis* and that in view of the foregoing, questions arose as to how the damage assessment and valuation reports could have been prepared. It was further submitted that the plaintiffs never deemed it necessary to call the agricultural officer who prepared the report who would have addressed the discrepancies in the report.
10. It was also submitted that plaintiffs in their recorded statements had stated that the total loss was Kshs 282,100/= yet in cross examination they confirmed that they were not involved in the valuation process and that they did not know how the figures depicted in their statements were reached. With regard to standard of proof, it was submitted that the plaintiffs had not discharged this burden and that an order for injunction could not issue as they had not met the grounds set out in *Geilla v Cassman Brown & Co Ltd (1973) EA 385.*
11. I have carefully considered the evidence on record and the rival submissions by the parties. The issues to determine are whether the prayers for injunction and the one for award of damages should be granted.

Permanent Injunction

12. PW1 produced a letter from the Land Adjudication Officer dated 5th November 2010, showing indeed that the suit property was registered in the names of the plaintiffs under common ownership and the contents of this letter were never challenged throughout the trial. The suit

land has since been registered in the name of 1st plaintiff as L.R.NO. Tigania/Antuamburi/9889. Further, it has emerged that some members of plaintiffs family for instance, PW4 reside on the suit land. It is also apparent that defendant is not claiming ownership of the suit land. I therefore find that there is undisputed evidence indicating that the suit property belongs to the plaintiffs.

13. The principles on which the courts will grant an injunction are well known. The Court of Appeal restated those principles in **NGURUMAN LIMITED V. JAN BONDE NIELSEN & 2 OTHERS, CA NO. 77 OF 2012**, where it was stated that;

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

(a) establish his case only at a prima facie level,

(b) demonstrate irreparable injury if a temporary injunction is not granted, and

(c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86”.

14. Having come to the conclusion that indeed the plaintiffs were able to prove that the suit property belonged to them, the plaintiffs are indeed entitled to the rights of a registered absolute proprietor of a parcel of land, which are exclusive, peaceful, unfettered, unimpeded possession, occupation and use thereof and I am satisfied that from the circumstances of this case an order of permanent injunction is merited.

Damages

PW1 testified that sometimes in July 2010, the defendant and his agents illegally and without their consent trespassed on the suit land and felled trees worth Kshs.282,100/= and ferried the same to Michiimikuru Tea Factory for sale as firewood. His evidence towards this respect was corroborated by PW2-4 who all gave similar evidence. In cross examination PW1 stated that the trees that were cut were many and that it was the agricultural officer who gave him the total number of trees. PW3 had actually found defendant with the lorry full of trees on the suit land.

It is trite law that special damages must not only be strictly pleaded but must be proved as well. See **Hahn V. Singh, Civil Appeal No. 42 Of 1983 [1985] KLR 716**, at P. 717, and 721 where the Learned Judges of Appeal – Kneller, Nyarangi JJA, and Chesoni Ag. J.A. – held:

“Special damages must not only be specifically claimed (pleaded) but also strictly proved....for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves”.

The plaintiffs were not aware of the tress known as *Mutendera, Muriru, Mikui* and *Vitex Emensis* which are mentioned in the plaint. Similarly the plaintiffs witnesses (PW2-4) all stated that they could not be able to tell the value of the trees that had been felled. Is also instructive to note

the malicious damages to trees assessment report dated 1st October 2010 and the valuation report thereof dated 12th October 2010 which was used to compute special damages contained some of these species of trees which the plaintiffs stated on cross examination that they had never grown on the suit property and as such it was not clear how the figure of Kshs.282,100 as the value of the trees was arrived at. I have no doubts that plaintiff's trees were damaged. I will give a round off figure of sh.141,000 as the loss of tress. (Half the amount claimed).

18. **Final orders**

- 1) **A permanent injunction is hereby issued restraining the defendant, whether by himself or through his agents/servants/employees/representatives and/or anyone else acting or claiming for, on behalf of or through him, from entering into and felling down the plaintiffs trees and/or whatsoever interfering with the plaintiffs quiet and actual possession, user and enjoyment of land parcel NO. L.R TIGANIA/ANTUAMBURI/9889.**
- 2) **Plaintiff is awarded special damages amounting to shs.141,000 for loss of trees.**
- 3) **Plaintiff is awarded costs of the suit with interests at courts rate which interest is to be computed from the date of delivery of this Judgment.**

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 15TH DAY OF MAY, 2019 IN THE PRESENCE OF:-

C/A: Kananu

C.P Mbaabu for plaintiff

Munga for defendant

1st plaintiff

Defendant

HON. LUCY. N. MBUGUA

ELC JUDGE